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IN THE

Supreme Court of the United States

October Term, 1963

No. 785

GERSON NAGELBERG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
The Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	10
Appendix A—Opinion of the Circuit Court of Appeals	11
Appendix B—Judgment of the Court of Appeals	12
Appendix C—	
Decision on Petition for Rehearing	13
Decision on Petition for Rehearing in Banc	14

Authorities Cited

Cases

Bergen v. United States, 145 F. 2d 181	5, 7
Gearhart v. United States, 272 F. 2d 499	4
Kercheval v. United States, 274 U.S. 220	5
Poole v. United States, 250 F. 2d 393	4, 6, 8
United States v. Norstrand Corp., 168 F. 2d 481	4, 5

Statutes

21 U.S.C. Secs. 173, 174	3
28 U.S.C. Sec. 1254(1)	2
Rule 32(d)	3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 24th day of October 1963, which affirmed an order of the United States District Court for the Southern District of New York denying petitioner's motion to withdraw a plea of guilty made *prior* to sentence and the judgment of conviction entered upon such plea.

The Opinion Below

The per curiam opinion of the Circuit Court of Appeals in this case has not yet been reported, but is set forth in Appendix A, infra, page 11.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 24th day of October 1963, Appendix B, *infra*, page 12. Rehearing was denied on November 27, 1963, Appendix C, *infra*, pages 13 and 14. By order of Honorable John M. Harlan, Associate Justice of this Court, dated December 13, 1963, the time for the filing of this petition for writ of certiorari was extended to and including the 25th day of January 1964.

Jurisdiction of this Court is invoked under 28 USC, Sec. 1254(1).

Questions Presented

1. Whether the Circuit Court of Appeals erred in basing its decision upon an inapplicable citation and in applying the wrong standard of "manifest injustice" to the petitioner's motion for withdrawal of his plea of guilty, which was made *prior* to sentence?

2. Whether the Circuit Court of Appeals erred in sanctioning the District Judge's mistreatment of petitioner's motion for withdrawal of the plea of guilty, as a request for clemency?

3. Whether the Circuit Court of Appeals erred in sanctioning the District Judge's wrongful assumption that the withdrawal of petitioner's plea of guilty *prior* to sentence, was not a matter of discretion?

4. Whether the Circuit Court of Appeals erred in sanctioning the arbitrary action of the District Judge in preventing petitioner from specifying the grounds of his motion to withdraw his plea of guilty?

5. Whether the Circuit Court of Appeals erred in basing its decision upon a contention not asserted by petitioner?

6. Whether the Circuit Court of Appeals erred in failing to construe petitioner's plea of not guilty, as an assertion of innocence.

Statute Involved

Rule 32(d) provides in pertinent part:

> "(d) A motion to withdraw a plea of guilty * * * may be made only *before* sentence is imposed * * *"

Statement of the Case

On April 11, 1962, petitioner was arraigned in the United States District Court for the Southern District of New York and charged with two offenses of possessing and selling narcotics and one count of conspiracy to do so. The jurisdiction of the District Court was invoked under 21 USC Secs. 173, 174. At that time petitioner pleaded "not guilty". Thereafter on July 18, 1962, petitioner changed his plea to "guilty". Subsequently, on November 16, 1962, and *prior* to sentence, petitioner moved for the withdrawal of such guilty plea and for leave to reinstate his plea of not guilty, upon the basis of certain unspecified factors and facts which had arisen since the guilty plea. This application was not opposed by the Government. Nevertheless, the motion was summarily denied and petitioner was not permitted to specify the grounds thereof. On March 18, 1963, the motion was renewed, this time with the consent of the United States Attorney, but was again denied, and *thereafter* sentence was imposed. Petitioner's motion was made *prior* to sentence.

In affirming the judgment of conviction, the Circuit Court of Appeals for the Second Circuit cited and relied upon *United States* v. *Norstrand Corp.*, 168 F. 2d 481 (2nd Cir. 1948), which petitioner contends is inapplicable to the case at bar.

Reasons for Granting the Writ

1. The Circuit Court of Appeals erred in basing its decision upon an inapplicable citation, to wit, *United States* v. *Norstrand Corp.*, 168 F. 2d 481, thereby ignoring and disregarding the distinction in the standards enunciated and prescribed by this Court between motions for withdrawal of a plea of guilty *after* sentence, from those made *prior* to sentence.

In this case, the motion to withdraw the plea was made *prior* to sentence, and is subject to the standard enunciated by this Court in the following cases:

In *Gearhart* v. *United States*, 272 F. 2d 499, the court stated:

> "When, however, as here, the motion to withdraw the plea is made *before* sentence is imposed, this court has interpreted the first clause of Rule 32(d) to set a more lenient standard."

In *Poole* v. *United States*, 250 F. 2d 393, 400, the court stated:

> "The trial court erred when it denied appellant's request to withdraw his plea of guilty. Leave to withdraw a plea *prior* to sentencing should be freely allowed. As we said in *McJordan* v. *Huff*, 1943, 77 App. D.C. 171, 172; 133 Fed. 2d 408, 409 • • • It

> goes without saying that a plea of guilty at that time (arraignment) can be and often is changed on proper motion, as a matter of course."

In *Bergen* v. *United States*, 145 F. 2d 181, 186, the court stated:

> "While the burden is on the accused to show cause for the changing of his plea, the court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, * * * and his motion seasonably made. And in any case, a motion should not be denied where it is evident that the ends of justice would best be served by granting it."

In *Kercheval* v. *United States*, 1927, 274 U.S. 220, at page 224, 47 S. Ct. 582, at page 583, 71 L. Ed. 1009, the court stated:

> "The Court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for *any* reason the granting of the privilege seems fair and just."

Whereas in the *Norstrand* case, *supra*, relied upon by the Circuit Court of Appeals, the motion to withdraw the plea was made *after* sentence, and the court there held that the defendant therein had failed to meet the standard of "manifest injustice" which is required to be proven in such motions *after* sentence.

The Circuit Court of Appeals erred in disregarding such distinction by applying the strict standard of "manifest injustice" enunciated in *Norstrand*, *supra*, and which is applicable solely to motions for the withdrawal of a plea

of guilty made *after* sentence, to the motion in the case at bar, which was made *prior* to sentence. The Circuit Court of Appeals below is without authority to obliterate such established distinctions and rewrite the prescribed standard for a motion to withdraw a plea of guilty made *prior* to sentence. Hence, the decision of the Circuit Court of Appeals, based as it was upon such inapplicable citation and inapplicable standard, was not determinative of petitioner's motion.

2. The Circuit Court of Appeals below erred in sanctioning the District Judge's mistreatment of petitioner's motion for withdrawal of the plea of guilty, as a request for clemency. Throughout the record the District Judge repeatedly referred to "clemency", although no request therefor was or could have been made. He remarked that he had no right to exercise clemency and that the only person who could exercise clemency was the President of the United States.

> "14(a) Counsel, my position is that the only person who can exercise clemency is the President of the United States * * * Congress has taken away from me the right to exercise clemency. I think I am right on the law, but if I am wrong, you should appeal."

Petitioner was entitled to have his motion for withdrawal of his plea of guilty treated as such. However, the District Judge failed to do so and refused to grant the motion because he apparently considered it as one for clemency which he was not authorized to grant. In so doing, the District Judge ignored the impact of this Court's decision in *Poole* v. *United States*, *supra*, wherein the

court mistreated the motion to withdraw a plea of guilty as one for reduction of sentence, stating:

> "Such a motion is essentially a plea for leniency and presupposes a valid conviction * * * It is wholly inadequate to test the propriety of allowing a guilty plea to stand."

Hence, the denial of petitioner's motion, based as it was upon a misconception as to the nature thereof, was not determinative of petitioner's motion.

3. The Circuit Court of Appeals erred in sanctioning the wrongful assumption of the District Judge that the withdrawal of the plea of guilty is not a matter of discretion thereby ignoring the established doctrine of *Bergen* v. *United States, supra*:

> "The granting or denial of a motion to withdraw a plea of guilty is within the discretion of the trial court * * *. An abuse of the Court's discretion in refusing to allow a withdrawal of a plea of guilty is reversible error * * *"

Throughout the record the District Judge constantly remarked that he had no discretion to grant the motion:

> "15(a) I don't think that the way you presented it presents a question of discretion, but it might be."
> "17(a) I have no power to withdraw or permit the withdrawal of the plea on the grounds advanced, whether the Government consents or does not consent—and I take it the Government consents."
> "17(a) I have no power to withdraw or permit the withdrawal of a plea on the grounds advanced. * * *"
> "17(a) You know, we have a lot of judges on the seventeenth floor who can decide it * * *"
> "17(a) And still I feel powerless to permit him to withdraw his plea."

It appears that the District Judge, having erroneously considered the petitioner's motion as one for clemency, therefore assumed that he had no discretion to grant the motion. The erroneous assumption of the District Judge that he had no discretion to permit the withdrawal of the plea of guilty becomes more apparent when the foregoing remarks are read in connection with his repeated references to "clemency". Hence, the decision of the District Judge, based as it was upon the erroneous assumption that the withdrawal of the plea was not a matter of discretion, is not determinative of petitioner's motion.

4. The Circuit Court of Appeals erred in sanctioning the arbitrary action of the District Judge in preventing petitioner from specifying the grounds of his motion by reason of the summary nature of the denial thereof, notwithstanding *Poole* v. *United States*, *supra*, which states:

> "Facts which come to light after entry of the plea may be used to show that the plea was invalid when entered."

In essence, the hearing of the motion consisted of the following colloquy:

> "12(a) Mr. Saunders: * * * At this time, if the Court pleases, on behalf of the defendant Nagelberg I move the plea of guilty heretofore interposed be withdrawn at this time * * * But there are *certain factors and facts that have arisen since the time of the plea*, and I think in the interests of justice, if the Court pleases, that this plea should be withdrawn at this time. * * * (Italics supplied).
> "The Court: Does the Government want to be heard?"

"13(a) Mr. Tendy: The Government will not object to defendant's application, sir.
"The Court: Motion denied."

Thereupon the District Judge refused to permit either defense counsel or the Assistant United States Attorney to approach the bench concerning such motion, although permission to do so was requested.

"13(a) Mr. Saunders: May we approach the bench?
"The Court: No * * *
"Mr. Tendy: I would request permission to approach the bench, your Honor.
"The Court: No * * *."

The District Judge should have afforded petitioner the opportunity to specify the grounds of his motion, to wit, the factors and facts which had arisen since the guilty plea. Hence, the decision of the District Judge in failing to do so, was arbitrary and in derogation of petitioner's right to set forth the grounds of his motion.

5. The Circuit Court of Appeals erred in basing its decision upon a contention not urged, and in fact, disclaimed by petitioner, to wit, post-plea cooperation. It was arbitrary for the Circuit Court of Appeals below to assume that there were no grounds in support of the motion, other than the post-plea cooperation of the petitioner. The post-plea cooperation of petitioner was not mentioned until after the denial of the motion for withdrawal of petitioner's plea of guilty, in an attempt to convince the District Judge to permit petitioner an opportunity to specify the grounds of the motion (13a). Thereafter, petitioner requested a reconsideration of the denial of the motion, not only upon the original grounds, but also upon the additional ground of

such post-plea cooperation (14a). The fatal prejudice to petitioner of being prevented from setting forth the grounds of his motion, was compounded by the wrongful assumption of the court that the only ground in support of the motion, was the post-plea cooperation of petitioner. Hence its decision is not determinative of petitioner's motion.

6. The Circuit Court of Appeals erred in failing to construe petitioner's plea of not guilty as an assertion of innocence. Moreover petitioner was prevented from reasserting his innocence by the summary denial of his motion. Hence its decision is not determinative of petitioner's motion.

CONCLUSION

For all of the reasons hereinabove set forth, it is respectfully submitted that this petition be granted and that a writ of certiorari issue.

Respectfully submitted,

IRWIN KLEIN
Attorney for Petitioner
Two Park Avenue
New York 16, N. Y.

APPENDIX A

Opinion of the Circuit Court of Appeals

PER CURIAM:

On July 18, 1962, appellant withdrew an earlier plea of not guilty, and voluntarily entered a plea of guilty to all three counts of an indictment alleging narcotics violations. Four months thereafter, following several adjournments of sentencing, he moved to withdraw the guilty plea on the grounds that he had subsequently cooperated with and been of assistance to governmental authorities. Finding that such cooperation would not, by itself, justify withdrawal of the plea, Judge Murphy denied the motion. Before appellant was finally sentenced to the statutory minimum of five years on each count (the sentences to run concurrently), and eight months after the entry of the plea of guilty, the motion was renewed on the same grounds, and was once again denied.

Appellant's willingness to be of assistance to the government is not a sufficient basis for permitting his plea of guilty to be withdrawn. Furthermore, appellant has never denied his guilt nor asserted that his plea was improperly induced or extracted, *United States* v. *Norstrand Corp.*, 168 F. 2d 481 (2nd Cir. 1948), although an unusually long period of time elapsed between July 18, 1962, when the guilty plea was entered, and March 18, 1963, the sentencing day.

We find no merit in appellant's other contentions. The judgment of conviction is affirmed.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN BATSON,
Defendant,

GERSON NAGELBERG,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Decision on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GERSON NAGELBERG,

Defendant-Appellant.

Before CLARK, MOORE, and KAUFMAN, Circuit Judges.

On Petition for Rehearing

Irwin Klein, New York City,
for defendant-appellant.

PER CURIAM.

Petition for rehearing denied.

C. E. C.
L. P. M.
I. R. K.
U. S. C. JJ.

Nov 27 1963

Decision on Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GERSON NAGELBERG,

Defendant-Appellant.

PETITION FOR REHEARING IN BANC

Irwin Klein, New York, N. Y.,
for defendant-appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

Nov 27 1963